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No. 83-628

In the Supreme Court of the United States

OCTOBER TERM, 1983

PRIMO MOLLICA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the en banc court of appeals erred in affirming the judgment of the district court when a different majority of the court of appeals agreed with the district court's disposition of each of the issues raised.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A57) is reported at 712 F.2d 826.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1983 (Pet. App. A61-A62). A petition for rehearing was denied on July 20, 1983 (Pet. App. A58-A60). On September 6, 1983, Justice Brennan extended the time in which to file a petition for a writ of certiorari to October 18, 1983, and the petition was filed on October 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1976, petitioner pleaded guilty in the United States District Court for the Western District of Pennsylvania to charges of racketeering, in violation of 18 U.S.C. 1961 *et seq.*, conducting an illegal gambling business, in violation

of 18 U.S.C. 1955, and conspiracy to obstruct law enforcement with intent to facilitate an illegal gambling business, in violation of 18 U.S.C. 1511. He was sentenced to five years' imprisonment and fined $15,000, but his prison term was suspended in favor of five years' probation. Pet. App. A3.

On February 19, 1981, petitioner was charged by Pennsylvania authorities with operation of a lottery, bookmaking, and conspiracy. The basis of this charge was evidence obtained in a search conducted by the Pittsburgh police pursuant to a warrant. Federal probation officials then moved for revocation of petitioner's probation on the ground that the conditions of his probation required him to refrain from violating any federal, state, or local law. An evidentiary hearing on the probation revocation petition was set for May 8, 1981, two days before petitioner's five-year term of probation expired. Pet. App. A3.

Petitioner sought to postpone the probation revocation proceedings until after the disposition of the state charges. Petitioner also requested use immunity so that any statements he might make in the revocation hearing could not later be used in his criminal trial. The district court declined to delay the proceedings and denied petitioner's request for immunity. Petitioner did not testify at the hearing. The district court also denied petitioner's motion to suppress the evidence that had been seized by the Pittsburgh police officers, holding that the exclusionary rule did not apply to probation revocation proceedings. Pet. App. A3-A4.[1]

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[1] A state court subsequently suppressed the evidence obtained in the search, and the State dismissed its charges against petitioner (Pet. App. A5).

On the basis of the evidence presented at the hearing, the district court found that petitioner had violated the Pennsylvania lottery and bookmaking statutes. It revoked his probation and imposed a five-year term of imprisonment. Pet. App. A4-A5.

2. The ten judges of the court of appeals, sitting en banc, affirmed the judgment of the district court (Pet. App. A1-A57).[2] The court of appeals was unanimous in several of its holdings: that the district court had jurisdiction to revoke petitioner's probation, even though its order was entered after the term of petitioner's probation had expired; and that the district court did not err in failing to state its reasons for the sentence it imposed, in not ordering disclosure of an informant's identity, and in refusing to grant immunity to defense witnesses other than petitioner (*id.* at A17-A19, A25-A30).

By a vote of six to four, the court held that the Fourth Amendment exclusionary rule does not apply to probation revocation proceedings. Judges Garth, Weis, Seitz, Adams, Hunter, and Becker formed the majority on this issue; Judges Gibbons, Aldisert, Sloviter, and Higginbotham dissented. Pet. App. A6, A8-A16, A41, A42-A46, A48, A49, A57.

Petitioner also contended that the district court was required to choose between postponing the probation revocation hearing until the state criminal prosecution was completed and granting him use immunity for any testimony he chose to give at the probation revocation proceeding. By a vote of six to four, the court of appeals rejected petitioner's contention, declining to adopt a supervisory

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[2]The panel had adopted a supervisory rule that probation revocation proceedings should ordinarily await resolution of the criminal charges on which they are based. Failing that, the panel ruled, use immunity should be granted to the probationer.

rule requiring district courts either to postpone probation revocation proceedings or to grant use immunity in circumstances like those present here. The court determined instead that the matter should be left to the district judge's discretion. Judges Seitz, Adams, Hunter, Becker, Sloviter, and Higginbotham formed the majority on this issue (see Pet. App. A6, A30, A48, A50-A56, A57); Judges Garth, Aldisert, Weis, and Gibbons dissented (*id.* at A6, A19-A20).

Finally, three judges, although believing that a supervisory rule was inappropriate, urged that the case be remanded to the district court to give petitioner an opportunity to testify if he now chose to do so. These judges — Judges Adams, Hunter, and Becker — reasoned that the district court's decision not to postpone the probation revocation hearing may have been influenced by its concern that such a postponement would divest it of jurisdiction to revoke petitioner's probation — a concern that the court of appeals had unanimously decided was unfounded. Pet. App. A49-A50. No other judges agreed that a remand was needed for this reason.

Because there was a majority in favor of the district court's rulings on each issue, the court of appeals affirmed the revocation of petitioner's probation (Pet. App. A7). The court reasoned (*ibid.*): "[I]t is apparent that the differing grounds on which these various votes for remand are rested cannot be reconciled so as to yield a majority vote for a remand with consistent instructions to the district court as to the manner in which it is to proceed." Judges Adams, Hunter, and Becker believed that a remand was the proper disposition (*id.* at A56-A57).

ARGUMENT

1. Petitioner does not challenge the merits of any of the court of appeals' rulings. His sole contention is that, given the views of the various members of the court, the proper disposition would have been to vacate the order revoking

probation and remand for further proceedings. Specifically, petitioner urges that this case resembles those in which a court reverses a judgment without majority agreement on a single rationale and announces its judgment in a plurality opinion.

This is not a case, however, in which a majority agreed on a certain legal proposition dispositive of the case but there happened to be no majority for any particular line of reasoning supporting that proposition. In this case, there was no majority favoring petitioner on *any* issue. It was purely fortuitous that all three issues came before the court on the same appeal, and the court of appeals did not err in refusing to allow this fortuity to affect the outcome of the case.

If, for example, the questions whether the exclusionary rule applies to probation revocation proceedings and whether to adopt the supervisory rule advocated by petitioner had already come before the court of appeals in earlier cases, the court would have decided that the exclusionary rule did not apply, and it would have declined to adopt the proposed supervisory rule. Those holdings would have been stare decisis by the time petitioner's case reached the court, and petitioner would have received no votes on either issue; a clear majority would then have voted to affirm the revocation of his probation.

Indeed, the three issues on which the court of appeals was divided might have arisen on separate appeals in petitioner's case itself.[3] Petitioner would have lost each appeal by a clear majority; the revocation of his probation would have been affirmed, by a clear majority, even though it resulted

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[3]This might have happened if a party successfully sought interlocutory review, or if a ruling of the district court on a particular issue caused the probation revocation petition to be dismissed and the government appealed successfully on that issue.

from a district court proceeding substantively identical to the one that actually occurred here.

The court of appeals acted reasonably in declining to give petitioner a windfall solely because his various contentions happened to arise on the same appeal. We do not suggest that the court was required to act in this fashion, or that a single rule can be devised to cover unusual situations such as this. But the court of appeals has some discretion to determine which result would be "just under the circumstances" (28 U.S.C. 2106), and the court decided, by a vote of seven to three, that an affirmance was the just result here.

The fact that some of the judges who voted to affirm also expressed individual views that agreed with petitioner's on some of the issues does not entitle petitioner to a reversal; those judges, after considering their colleagues' views, made the reasonable decision to vote for affirmance. They in effect decided that, given their colleagues' views, institutional considerations warranted them in treating their own views on the exclusionary rule or supervisory rule issues in the way they might treat their disagreement with a binding precedent — as a subject for discussion but not a determinant of their votes.

2. Petitioner also appears to suggest (Pet. 15-16) that because four judges — Judges Garth, Aldisert, Gibbons, and Weis — urged the adoption of the supervisory rule advocated by petitioner, those judges necessarily must have agreed with Judges Adams, Hunter, and Becker that the case should have been remanded to allow petitioner another opportunity to decide whether to testify. But Judge Garth and the others who joined his opinion expressly considered and rejected Judge Adams's view (Pet. App. A24-A25 & n.5). They plainly did not agree with Judge Adams that the district court was influenced, in exercising its discretion not to postpone the revocation proceeding, by the concern that

a postponement would divest it of the power to revoke probation, and they therefore considered a remand unnecessary. There is no reason to believe that these judges misunderstood their own views. The fact that petitioner is *now* willing to testify, as he insists (Pet. 16), does not entitle him to a second chance; he had an opportunity to testify earlier, and he declined to exercise it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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